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Wahyudin v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — APPEAL NO Q-05(M)-178–05 OF 2017
HAMID SULTAN, ABANG ISKANDAR AND BADARIAH SAHAMID JJCA
15 JANUARY 2019

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Criminal Procedure — Defence — Innocent carrier — Drug-trafficking trial — Whether accused's defence that he was innocent carrier implausible on facts circumstances and evidence of case — Whether accused failed to rebut presumptions of possession and trafficking under ss 37(d) and (da) of the Dangerous D *Drugs Act 1952 — Whether accused had not cast any reasonable doubt on prosecution's case — Whether prosecution proved its case against accused beyond reasonable doubt — Whether trial court's conviction and sentence of accused to be upheld*

E The appellant was caught with 2,290g of methamphetamine hidden in a bag when a police officer ('PW5') raided and searched a hotel room where he was staying in Kuching, Sarawak. The drugs were hidden in a secret compartment of the bag which contained some clothes and a Malaysian Airlines tag with the appellant's name on it. In defence to a charge of trafficking in the drug, the F appellant claimed that he was an innocent carrier as he had no knowledge of the drug or of the secret compartment in the bag. He said he was in Jakarta, Indonesia, when he accepted an all-expenses-paid round trip offered by his cousin, Eva, to follow her to Hong Kong to bring back items for a garment business. When Eva and the appellant were in a hotel in Hong Kong a bag was G delivered to them with the instruction that it was to be delivered to a man in Kuching. The appellant said he was promised five million Indonesian Rupiah if he carried out the task. The appellant said he and Eva emptied the bag and searched it to make sure it contained nothing incriminating. All they found in the bag were some new clothes and shoes. At the trial, the prosecution refuted H the appellant's version by saying that if the appellant had indeed emptied and searched the bag, his suspicions would have been aroused by the bag's unusual heaviness despite it being empty (because of the more than 2kg of the methamphetamine in the secret compartment) — the same way PW5 became suspicious when he emptied the bag while searching it in the appellant's hotel I room. The prosecution also argued that Eva's testimony that her trip to Hong Kong with the appellant was to collect a bag of clothes for a garment business was not plausible as the bag only contained four pairs of jeans (two of which were identical) and two t-shirts, which items could have been easily sent to Kuching by post or by courier rather than to pay someone five million Rupiah

to transport them. Besides the issue of innocent carrier, the appellant also raised other defences at the trial, notably issues which could allegedly create suspicion that the drug exhibits had been tampered with. These issues included: (a) the difference in gross weight of the drug when it was weighed by the police upon seizure and when it was later weighed by the chemist; (b) the chemist's failure to account for a spare set of keys he had to his locker where the drug exhibits were kept; and (c) the prosecution's failure to tender the exhibit store register or to call the exhibit store keeper as a witness. After considering all the evidence and relevant law, the trial judge rejected all of the appellant's defences, found that he had failed to cast a reasonable doubt on the prosecution's case and also that he had failed to rebut, on balance of probabilities, the presumptions of possession and trafficking that were invoked against him pursuant to ss 37(d) and (da), respectively, of the Dangerous Drugs Act 1952. The appellant was convicted and sentenced to death. The instant appeal was against the conviction and sentence.

Held, unanimously dismissing the appeal and affirming the conviction and sentence:

(1) The evidence before the trial judge was such that he was justified in concluding as he did that a case beyond reasonable doubt had been established by the prosecution against the appellant on the trafficking charge. The trial judge was right in concluding that there was no break in the chain of evidence, that the appellant had failed to rebut the presumptions of possession and trafficking on balance of probabilities and that he was not an innocent carrier but a trafficker (see paras 30–33).

(2) The fact that the appellant's cautioned statement aligned with his testimony in court did not necessarily mean that what he had alluded to in both instances had to be the truth or had to be given credence such that the presumptions invoked against him were thereby rebutted on balance of probabilities or that he had created a reasonable doubt on the prosecution's case. The appellant's evidence, including his cautioned statement, had to be evaluated in the light of the entirety of the evidence adduced before the court (see para 24).

(3) Where available evidence was already overwhelming to connect the accused with the drugs seized, not all investigative tools at the disposal of the police had necessarily to be applied to establish the case against the accused. It would all depend on the dictates of the situation at hand confronting the investigating officer. An investigation was left entirely to an investigating officer's discretion and his ultimate vindication would take place at the trial where the sufficiency or otherwise of his investigative work would be unravelled for all to see (see para 29).

[Bahasa Malaysia summary

Perayu ditangkap bersama 2,290g methamphetamine yang tersembunyi dalam beg semasa pegawai polis ('PW5') membuat serbuan dan carian bilik hotel di mana dia tinggal di Kuching, Sarawak. Dadah itu disembunyikan di bahagian rahsia beg yang mengandungi beberapa helai pakaian dan tag Malaysian Airlines dengan nama perayu. Dalam pembelaan kepada pertuduhan pengedaran dadah, perayu mengatakan bahawa dia pembawa yang jujur kerana dia tidak mempunyai pengetahuan tentang dadah itu atau bahagian rahsia dalam beg tersebut. Dia mengatakan dia di Jakarta, Indonesia, apabila dia menerima tawaran perjalanan yang dibayar keseluruhannya oleh sepupunya, Eva, untuk mengikutnya ke Hong Kong bagi membawa balik barangan perniagaan pakaian. Apabila Eva dan perayu berada di hotel di Hong Kong sebuah beg telah dihantar kepada mereka dengan arahan ia diserahkan kepada seorang lelaki di Kuching. Perayu mengatakan dia dijanjikan lima juta Rupiah Indonesia jika dia melaksanakan tugas tersebut. Perayu mengatakan dia dan Eva telah mengosongkan beg tersebut dan memeriksanya untuk memastikan ia tidak mengandungi apa-apa mencurigakan. Mereka hanya menjumpai beberapa pakaian dan kasut baharu dalam beg tersebut. Semasa perbicaraan, pendakwaan membantah versi perayu dengan mengatakan bahawa jika perayu sememangnya telah mengosongkan dan memeriksa beg tersebut, dia akan berasa syak dengan keberatan beg tersebut meskipun ia telah dikosongkan (kerana methamphetamine yang melebihi 2kg dalam bahagian rahsia itu) — cara yang sama PW5 menjadi syak apabila dia mengosongkan beg tersebut apabila memeriksanya di bilik hotel perayu. Pendakwaan juga berhujah bahawa keterangan Eva bahawa perjalanannya ke Hong Kong dengan perayu adalah untuk mengutip beg pakaian untuk perniagaan pakaian adalah tidak munasabah kerana beg tersebuat hanya mengandungi empat pasang seluar jeans (dua yang mana adalah serupa) dan dua kemeja T, yang merupakan barangan yang dengan senang boleh dihantar ke Kuching melalui pos atau kurier daripada membayar seseorang lima juta Rupiah untuk menghantarnya. Selain daripada isu-isu pembawa yang jujur, perayu juga menimbulkan pembelaan lain semasa perbicaraan, terutamanya isu-isu yang boleh dikatakan menimbulkan syak bahawa ekshibit-ekshibit dadah telah diusik. Isu-isu tersebut termasuklah: (a) perbezaan dlaan berat kasar dadah tersebut apabila ia ditimbang oleh polis semasa rampasan dan apabila ia ditimbang semula oleh ahli kimia; (b) kegagalan ahli kimia untuk membuat set kunci ganti yang dia ada untuk lokernya di mana ekshibit-ekshibit dadah tersebut disimpan; dan (c) kegagalan pendakwaan untuk menenderkan ekshibit daftar stor atau untuk memanggil penjaga ekshibit stor sebagai saksi. Setelah mempertimbangkan semua keterangan dan undang-undang relevan, hakim perbicaraan telah menolak semua pembelaan perayu, mendapati bahawa dia telah gagal menimbulkan keraguan munasabah ke atas kes pendakwaan dan juga bahawa dia telah gagal untuk memathkan, atas imbangan kebarangkaian, andaian milikan dan pengedaran yang digunakan terhadapnya menurut ss 37(d) dan

(da), masing-masingnya, Akta Dadah Berbahaya 1952. Perayu telah disabitkan dan dihukum mati, rayuan ini adlaah terhadap sabitan dan hukuman tersebut.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Keterangan di hadapan mahkamah perbicaraan adalah bahawa beliau berasa wajar untuk membuat kesimpulan yang suatu kes melampaui keraguan munasabah telah dibuktikan oleh pendakwaan terhadap perayu atas pertuduhan pengedaran dadah. Hakim perbicaraan adalah betul untuk memutuskan bahawa rantaian keterangan tidak terputus, bahawa perayu telah gagal mematahkan andaian milikan dan pengedaran atas imbangan kebarangkalian dan bahawa dia bukan pembawa yang jujur tetapi seorang pengedar (lihat perenggan 30–33).

(2) Hakikat bahawa kenyataan beramaran perayu selari dengan keterangannya di mahkamah tidak semestinya bermaksud bahawa apa yang dikatakannya dalam kedua-dua keadaan adalah benar atau perlu diberi kredit sehingga andaian yang digunakan terhadapnya dipatahkan aas imbangan kebarangkaian atau dia telah menimbulkan keraguan munasabah ke atas kes pendakawaan. Keterangan perayu, termasuk kenyataan beramarannya, telah diteliti berdasarkan keseluruhan keterangan yang dikemukakan di hadapan mahkamah (lihat perenggan 24).

(3) Di mana keterangan yang ada adalah jelas untuk mengaitkan tertuduh dengan dadah yang dirampas, buka semua alat siasatan yang ada pada polis perlu digunakan untuk membuktikan kes terhadap tertuduh. Kesemuanya bergantung kepada keadaan yang dihadapi oleh pegawai siasatan. Suatu siasatan terletak kepada budi bicara pegawai siasatan dan kebenaran muktamadnya akan berlaku semasa perbicaraan sama ada tugas siasatannya adalah mencukupi atau sebaliknya dapat dilihat oleh semua (lihat perenggan 29).]

Notes

For cases on innocent carrier, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2283–2284.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16; [1985] CLJ 19, SC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Ghasem Gharezadehsharbiani Hassan v PP [2014] 5 MLJ 433, CA (refd)
Hasbala Mohd Sarong v PP [2013] 6 MLJ 636; [2013] 6 CLJ 945, FC (refd)
Loh Kah Loon v PP [2011] 4 MLJ 260; [2011] 5 CLJ 345, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 2073, SC (refd)

A *Munusamy v PP* [1987] 1 MLJ 492, SC (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (refd)
Su Ah Ping v PP [1980] 1 MLJ 75; [1979] 1 LNS 100, FC (refd)

B **Legislation referred to**

Dangerous Drugs Act 1952 s 37(d), (da)
Evidence At 1950 s 114(g)

Appeal from: Criminal Trial KCH-45A-3/2 of 2015 (High Court, Kuching)

C

Ranbir Singh Sangha (Ranbir S Sangha & Co) for the appellant.
Tengku Intan Suraya bt Tengku Ismail (Attorney General's Chambers) for the respondent.

D **Abang Iskandar JCA (delivering judgment of the court):**

THE CHARGE

Bahawa kamu pada 6/11/2014 jam lebih kurang 3.00 pagi, bertempat di Bilik Hotel No 306, Fifty Six Hotel, Lot 2228 & 2229, Section 64, KTLD Jalan Tun
E Jugah, dalam daerah Kuching, dalam negeri Sarawak telah mengedar dadah berbahaya iaitu methamphetamine seberat 2,290 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

F BRIEF FACTS OF THE CASE

[1] On 6 November 2014, Insp Mohd Kairil Mohd Johar ('PW5') was informed by his superior officer of an arrest on an Indonesian woman named Eva Slyviana ('Eva') at Kuching Airport. PW5 interrogated Eva and found that
G Eva was supposed to check-in at Hotel Fifty Six ('hotel'). PW5 went to the hotel to get further information.

[2] PW5 approached an employee of the hotel and the employee said Eva had not checked-in, however, there is one Indonesian man who had checked-in
H in another room. The man was later identified as Wahyudin ('the appellant'). The employee said, the appellant also asked about Eva as well. PW5 decided to check the room occupied by the appellant.

[3] PW5 went to appellant's room and introduced himself as a police officer.
I After a search was made, PW5 found a black bag with the label 'OR and MI' with a tag of Malaysian Airline with the appellant's name on it and some new clothes in the bag. PW5 also found a hidden compartment in the bag with two packages wrapped in purple plastic wrapper. A small sling bag was found on the bed that contained identification papers, e-ticket and handphones.

[4] The appellant was brought to the police station together with the items seized and PW5 handed them over to the investigation officer ('IO'), Insp Abang Zulkernaen bin Abang Kerni ('PW6'). PW6 gave the two packages wrapped in purple plastic wrapper to the chemist, En Mohd Riduan bin Md Bakhir ('PW2'). PW2 then conducted an analysis on the contents of the two packages and found them to be dangerous drugs, to wit, methamphetamine, weighing 2,290g.

[5] The appellant was duly charged in the High Court for drug trafficking in respect of the methamphetamine that was found from inside his bag. The prosecution had called the witnesses whom it believed were relevant in establishing the case against the appellant as per the charge.

[6] At the end of prosecution case, the learned judicial commissioner ('JC') found that the prosecution had established a prima facie case against the appellant and he was thus called to enter his defence. When calling for the defence, the learned JC was of the view that the evidence led by the prosecution had established the factum of possession by way of invoking the presumption of possession under s 37(d) of the DDA 1952. By virtue of the weight of the dangerous drug that far exceeded the statutory threshold amount, the learned JC had invoked the presumption of trafficking under s 37(da) of the DDA 1952.

CASE FOR THE DEFENCE

[7] The appellant's version was that, he was invited to go to Hong Kong by Eva, his cousin. He agreed to follow Eva to Hong Kong when she said he would be paid five million Rupiah for a task to bring back items relating to garment business. He said the bag was delivered to the hotel room in Hong Kong to Eva by a Chinese lady. After the Chinese lady gave the bag to Eva, the appellant assisted Eva to check the contents of the bag in front of the Chinese lady. They took out the contents of the bag, which contained some new clothes and shoes. After checking that the bag did not contain any incriminating material, they placed the clothes and shoes back into the bag. He said he was then asked by Eva to bring the bag to Kuching for a person by the name of John and that someone would collect the bag when he arrived in Kuching. The appellant said that he did not know that the bag contained drugs at that time. He also did not suspect that the bag had a secret compartment. The appellant contended that he did not know much about John, as John was mostly in contact with Eva. The appellant called Eva as his witness and she was DW2 in this case. In essence, the appellant's defence was that he was an innocent carrier.

A FINDINGS OF THE HIGH COURT

[8] At the end of the whole trial, the learned JC of the High Court found that the defence failed to cast a reasonable doubt on the prosecution's case. He had also found that the appellant had failed to rebut both the presumptions of possession and trafficking on the balance of probabilities. The appellant was therefore found guilty and was sentenced to death by hanging. Aggrieved with such decision, the appellant had since filed a notice of appeal against it to the Court of Appeal.

C THE APPEAL

[9] Before us, the appellant's learned defence counsel, Mr Ranbir Singh Sangha ('Mr Ranbir') emphasised on the issue that had pertained to the alleged break in the chain of evidence in relation to the drug exhibits, the subject matter of the charge. He submitted that there existed material breaks in the chain of evidence in relation to the alleged exhibits seized from the appellant with regards to the following:

(a) the discrepancy in the gross weight of the alleged exhibits seized;

(b) the absence or presence of the black sponges on the alleged drug exhibits handled by the raiding officer (PW5), investigating officer (PW6) and the chemist (PW2);

(c) the discrepancy in the description of the red wax seals;

(d) the chemist's spare key to his locker that is unaccounted for; and

(e) the failure to tender the exhibit store register nor call the exhibit store keeper.

[10] We had perused the grounds of judgement of the learned JC and we noted that he had dealt with these issues individually. As regards the discrepancy in the gross weight of the alleged exhibits seized, essentially the complaint of the appellant on this issue was that the gross weight of the seized drugs exhibits given by the raiding officer (PW6) was 1,310g in respect of exh P11 and 1,820g in respect of exh P13, whereas the gross weight given by the chemist (PW2) was stated at 1,285g in respect of exh P11 and 1,804.71g in respect of exh P13. In light of these apparent discrepancies as to the gross weight of the two exhibits, learned counsel for the appellant submitted that the identity of the drugs exhibits produced in court must be suspect, and the possibility of tampering was also suggested, thereby casting a serious and reasonable doubt on the prosecution case. The learned deputy public prosecutor ('DPP') before us submitted that the witnesses called by the prosecution who handled the exhibits were called to testify and they testified to the effect that the exhibits that they were confronted with in court were the

very exhibits that they had handled in the course of the investigation into this case. They had identified them by way of the markings they had made on the exhibits. As regards to the gross weight's differences of the exhibits, the explanation given was that the police witness and the chemist had used different weighing machines when they did their respective weighing of the exhibits. The factual scenario surrounding this issue pertaining to the difference in gross weights as recorded by the chemist (PW2) and the raiding officer (PW6) was captured in the grounds of judgement of the learned JC in para [62] therein, as follows:

> Learned counsel further submitted that if this court were to compare again the weight of the packages AZ1 and AZ2 as testified by the witnesses after having taken into account the weight of the shiny plastic packages, the court would discover that there was a gross difference of 24.984g in AZ1 and 15.286g in AZ2. In short the difference between PW6's and PW2's gross weight findings are as follows:
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> (a) P11(A) plus P11(A)(1) plus P11(B): 1310g [PW6] – 1285.016g [PW2] = 24.984g
>
> (b) P13(A) plus P13(A)(1) plus P13(B): 1820g [PW6] – 1804.714g [PW2] = 15.286g.

[11] The learned JC having considered the evidence and having seen the witnesses, had accepted the explanation given in respect of the difference in the gross weight as one that was reasonable and acceptable.

[12] We noted that in coming to that conclusion, the learned JC had addressed his mind to quite an extensive line of high authorities on the issue of weight discrepancies between police witnesses and chemist in drug trafficking cases. From the long line of decided cases on this 'different weight' issue, the existence of a discrepancy may not be necessarily fatal to the prosecution case, as long as such discrepancy can be explained away satisfactorily within acceptable reason. This proposition can find support in the Federal Court decision in the case of *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636; [2013] 6 CLJ 945, which had affirmed the decision of *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345 where it was commented as follows:

> [22] In this regard, we are minded of the fact that decided cases had shown that the difference in weight of the drug exhibits between the police and the chemist when left unexplained could result in creating a reasonable doubt to the prosecution's case. This is however dependent on the facts of each case ...

[13] The apex Court Justices went on to explain what had happened in the *Loh Kah Loon v Public Prosecutor* as follows:

> [23] However, in *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345, this court upheld the decision of the courts below even though there

existed a discrepancy in the weight of the drug exhibits as found by the police and the chemist. In that case the High Court as well as the Court of Appeal found it as a fact that there was no doubt in the identity of the drug exhibits because the evidence before the court showed there was no break in the chain of evidence. The movement of exhibits was clearly explained, and the markings on the drug exhibits were positively identified by the witnesses. The courts below were satisfied that the drug exhibits that were seized from the appellant were the same exhibits produced in the High Court.

[14] As it had come to pass, the learned JC accepted the explanation given by the prosecution witnesses and also the fact that the relevant witnesses for the prosecution had positively identified the exhibits as the same exhibits that they had handled in the course of their investigation pertaining to this case. With respect, we could find no reason to fault the learned JC with regard to his conclusion on the weight discrepancy issue. We found the complaint raised on behalf of the appellant to be without merit.

[15] The next issue on the break in the chain of evidence had been the allegation that chemist's spare key to his locker that was unaccounted for. This issue arose because of what the chemist PW2 had earlier testified in a separate trial involving another accused person where he was also the chemist who had analysed the drugs that formed the subject matter of the charge there. In the course of his evidence in that other case, the chemist testified that he had two sets of keys to his locker. On account of this, learned counsel for the appellant had submitted that other staff of PW2 could have access to the locker, thereby insinuating further that the exhibit drugs could be tampered with. PW2 testified that he could not recall what he had said in the other case. The learned JC who had the advantage of observing the demeanour of this witness had found no reason why he ought not believe the testimony of PW2 on his explanation and on the fact that PW2 had identified positively the exhibits in court as the very exhibit which he had analysed after he had received the same from the police, by way of the markings that he had made on the exhibits. We found no cogent reason to deviate from his findings on the issue. At para [80] of his grounds of judgement the learned JC had stated:

In the present case, to counter the arguments on this point and also on the point relating to the testimony of PW2 that there was only one set of key to PW2's locker, the learned DPP had argued in this case the relevant witnesses [PW2, PW5 and PW6] had established in their evidence that they have taken all the necessary steps to ensure that the exhibits were in their custody at all times, and they have identified the said exhibits when the exhibits were produced in court through the marking that they had make. In the circumstances, it cannot be said that the identity of the said exhibits was in dispute or that it had been tampered with. I see no reasons not to agree with the submission of the learned DPP on this point.

[16] Another issue raised had been the failure of the prosecution to call the

store keeper as a witness and the non-production of the exhibit register book. In this regard, learned counsel had urged the learned JC to invoke the adverse inference against the prosecution. We noted that the learned JC had cited the Federal Court case of *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75; [1979] 1 LNS 100 which has long been held as the high authority for the proposition that not all and every person who has handled the exhibit in its historical journey, must be called to give evidence in court or else an adverse inference shall be invoked against the prosecution under s 114(g) of the Evidence At 1950. The mischief that s 114(g) seeks to address is a situation where there is suppression of material witness or material evidence by the prosecution in a criminal proceeding so as to occasion a prejudice against the accused person leading to a substantial miscarriage of justice. In such a case, the adverse inference may justifiably be invoked against the suppressing party (see, generally the Supreme Court case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 per Mohammed Azmi SCJ). In a prosecution, the discretion to call a witness lies with the prosecutor and no one can force the prosecutor whether to call a particular witness but that having been said, an exercise of such discretion by the prosecutor is governed, always, by the consideration that non-calling of a witness may leave a gap in the prosecution's case (see the case of *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16; [1985] CLJ 19 per Salleh Abas LP) As such, did the non-calling of the store keeper and the non-production of the exhibit register book cause a gap in the proof of the drug exhibits beyond reasonable doubt? The learned JC had answered that in the negative. Having perused through the appeal record, we were in agreement with him in that there was no reason why an adverse inference ought to be invoked against the prosecution.

[17] As to the issues on the red wax seal and the absence or presence of the black sponges on the exhibits the learned JC was of the view that these issues were not really of material significance in the scheme of the overall bigger picture, in light of the nature of the available evidence led by the prosecution. Again we would defer to his conclusion as the identity of the drug exhibits had been positively identified by the relevant prosecution witnesses. Here, again we could not overemphasise the significance of what learned Justice Suffian LP had said nearly 40 years ago in the locus classicus case of *Su Ah Ping*, where His Lordship had occasion to say: 'In our judgement, if the officer who picked up an object at the scene produced it and identified it as that very object, that is enough ...'. In this case, the witness PW6 had positively identified the two incriminating exhibits based on the markings which he had almost contemporaneously made on them. It was therefore correct for the learned JC to regard the issues raised about the wax and black sponges as, without being derogatory, de minimis.

[18] Besides the complaints that the appellant had with regard to the alleged

A breaks in the chain of evidence, the appellant had also submitted that the learned JC was in error when he failed to rule that the appellant was in fact an innocent carrier, not a drug trafficker. In fact, the essence of the appellant defence had been that he was merely an innocent carrier.

B **[19]** The learned JC was aware of this defence and he had devoted a good portion of time appreciating the appellant's defence as such, and at the end of that judicial exercise, he had concluded that the appellant had failed to rebut the presumptions of possession and trafficking that were operating against the appellant on the balance of probabilities.

C

[20] In the course of evaluating the appellant's defence of innocent carrier, the learned JC had discussed the law on the defence of innocent carrier in a drug trafficking case under the DDA 1952. In fact, such a defence is nothing D new and it has a close proximity in terms of application with the notion of wilful blindness. We now would allude to the learned JC's treatment of this defence in the course of his grounds of decision, like so:

> [107] In order to raise a defence of innocent carrier, an accused must show that he did not have the knowledge and had taken steps to make inquiries on the contents E of the bag. The defence in the present case had submitted at length that the accused not only did not know about the drugs in the bag but he also taken reasonable steps to ensure that the items that he was carrying was not an incriminating substance. The accused testified that he had taken those measures when he and DW2 checked the bag in the hotel room after it was delivered to DW2 on the 3 November 2014. F That is a clear two days before the accused departed from Hong Kong to Kuching where he was arrested.
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> [108] The prosecution, in urging the court to be wary of the said evidence, submitted that the evidence of the accused and DW2 had checked the bag ought not to be accepted as the truth considering the facts of this case. It was pointed out G the quantity of the drugs in this case is quite substantial ie more than 2kg. If indeed the accused had emptied the bag and checked the contents of the bag, the accused would have realised the bag would still be heavy even when the contents has been emptied. In fact, this was what PW5 discovered when he checked the bag. It was the weight of the bag when it is empty that caused PW5 to suspect that something was H amiss about the bag. On careful observation, he found there was a slight bump on the bag and after further observation he found traces of glue on the outer lining of the secret compartment.
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> [109] Now, having considered PW5's evidence, I am of the view that if the accused had checked the bag thoroughly, I do not see why he cannot detect that something I was amiss especially considering the weight of the bag when it was empty. The defence had argued that there were no reasons for the accused to suspect something was amiss as he was not suspicious or was not out to look for something amiss with the bag unlike PW5. With respect, I do not accept the said argument. Firstly, what was the purpose of the accused and DW2 checked the bag upon receiving it from the Chinese lady. Based on the evidence of DW2, the reason why she had checked

the bag was she feared that she would be cheated by John. In other words she was worried that John would have played her out by stuffing the bag with incriminating matter. It was for that reason that she said she checked the bag and its contents. Upon seeing DW2 checked the bag, the accused as a reasonable person would have also entertained doubt as to what was inside the bag. Yet despite that the accused did not offer any explanation why he was not thorough in checking. If he had, he too would have noticed that the bag was still heavy upon the contents had been emptied.

[110] Based on the evidence, I take the view that his evidence and the evidence of DW2 on the matter is highly suspicious and I do not believe that he did not know what was inside the bag. I believe that the evidence of that he had checked the bag with DW2 was merely a ploy to disassociate themselves with the contents in the hidden compartment of the bag in the event that they were arrested. I take this view by looking at the circumstances of this case as whole. Looking at the evidence, it was clear that the accused knew what he was required to do by accepting the offer to go to Hong Kong with DW2. From his own evidence he knew that he was required to carry bags or to bring back items for DW2. He also knew that DW2 would pay for his expenses and had indeed paid for all his expenses for his whole trip from Jakarta to Kuching. On top of that he will also be paid five million Rupiah for his task.

[111] Now, since he was tasked to carry the items for his trip back from Hong Kong to Jakarta, the first thing that would raise his suspicion on his task was when he was given the bag to carry back with him. The learned DPP has submitted on this point and I completely agree with him. I reproduced what he said:

> It would definitely raise suspicion in this case, the reason that Eva gave for her trip to Hong Kong which was to collect bag containing clothes for trading was not plausible. If the Accused claimed was right, that he checked the content of the said bag, he would realise that there was only 4 pairs of jeans and 2 t-shirts in it. According to him, he was informed by DW2 that these clothes were for trading as explained by John. And if it is true that he was asked to follow Eva in order to bring this bag and once it being handed to someone else, he will be paid 5 million Rupees. Does it not raise any suspicion on the Accused? The clothes inside the bag was very minimal in number, in which it is more economical for them to be couriered or to be posted? Or at least, don't it raised suspicion if someone willing to pay 5 million Rupees for only that 6 clothes? If the Accused indeed checked, don't it raise suspicion why would there be 2 same items being bought as a sample. Kindly refer to Exhibit P25 and P26, the said jeans are identical! Nothing in evidence that could suggest that the Accused had made an inquiry over these.

[112] The defence in rebutting the arguments advanced by the prosecution had placed heavy reliance on the arguments that the accused did not make further inquiries on the matter as he trusted DW2, he was a simpleton and was merely relying heavily on the instructions given by DW2. Again the learned DPP pointed out if he was a simpleton and had relied on DW2 for instructions, how did the accused managed to find his way from Hong Kong to Kuching and arrived at the hotel that had been booked by DW2 all on his own effort? He certainly is not as what was portrayed by the defence. Again, I agree with his submission on this point.

A [113] In conclusion, after hearing the evidence of the accused and DW2, I do not accept the defence of the accused that he was an innocent carrier as claimed. I also do not believe his evidence that he had checked the bag and from the surrounding circumstances of the case, I find that he knew what he was up to and he knew what was inside the secret compartment of the bag. In the circumstances he did not B manage to raise a doubt in the prosecution case neither did he managed to rebut the statutory presumption of possession that had been invoked against him. Whether the accused had rebutted the statutory presumption of trafficking under s 37(da) of the DDA.

C **[21]** We noted too that the learned JC had directed his mind to the relevant decided cases which are authorities on matters related to the defence of innocent carrier in a drug trafficking prosecution. The first case on point referred to by the learned JC was the *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073 ('the *Mohamad Radhi* D case').

[22] We reproduce below the learned JC's treatment of the appellant's defence on he being a mere innocent carrier, as follows:

E [114] In the course of the submission, the defence had also advanced the arguments that the actual trafficker in this case is John and/or Eva and the accused merely had the bag with him when he was arrested. In other words, he was merely a mere possessor of the bag without knowledge of the impugned drugs. In view of the arguments, it is necessary for this court to consider the principles as laid down in the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] F 3 CLJ 2073; which is commonly referred to as the *Radhi* direction.

[115] In the case of *Yee Wen Chin v Public Prosecutor* [2008] 6 MLJ 222; [2008] 6 CLJ 773, the *Radhi* direction was explained in the judgment of Gopal Sri Ram JCA as follows (at p 784): 'In the course of cross-examining the prosecution witnesses it was extracted from PW5 that the information he had received was that Woo Kok G Mend was trafficking in drugs at the place in question. The defence quite properly took advantage of this fact to demonstrate that Woo was the real trafficker and that the accused was entirely innocent. The accused was clearly entitled to do this in view of the decision in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073 (SC). That case is authority for the proposition that a H person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether I that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken. See *Sochima Okoye v Public Prosecutor* [1995] 3 CLJ 371 (CA).

[23] Now, having gone through the records of this appeal, we were satisfied

with the conclusion arrived at by the learned JC in light of the evidence led by the appellant and by DW2, applied by him in the context of the applicable law on the defence of innocent carrier. He was correct in arriving as he did at the finding that the appellant was the drug trafficker in this case. He was not able to rebut the presumption of possession as well as the presumption of trafficking in the said drugs on the balance of probabilities after having considered all the available evidence placed before him, including the caution statement of the appellant as well as the oral evidence of Eva, the DW2.

[24] The fact that the caution statement of the appellant was aligned with what he testified under oath in court did not necessarily mean that what he had alluded to in both instances must be the truth or must be given credence such that the presumptions were thereby rebutted on the balance of probabilities, or that a reasonable doubt must have been created by such evidence as to cast a reasonable doubt on the prosecution's case. The appellant's evidence, including his caution statement must be evaluated in light of the entirety of the evidence adduced before the court.

[25] The caution statement and the oral evidence of the appellant in this case had mentioned the name Eva and John. It was suggested by the appellant that real trafficker was either, his own cousin namely DW2, or the character mentioned as John in his evidence and in his caution statement. DW2 was called as the appellant's witness and she denied having anything to do with the impugned drugs mentioned in the charge that was preferred against the appellant in this case. More significantly, she had also denied that she was the trafficker in relation to the said drugs. That had left John as the suspected trafficker. But nothing much was known of John who had purportedly given the appellant the bag that had contained the drugs in Hong Kong for the purpose of the appellant handing it over to someone who would be picking the said bag in Kuching from the appellant. The learned JC had considered this matter in his appreciation of the appellant's defence of innocent carrier. After applying the two tier test alluded to in the *Mohamad Radhi* case the learned JC had concluded that John was a figment of the appellant's imagination, or otherwise known as a fictitious person. That ended the matter in so far as the innocent carrier defence was concerned. With respect, we were in agreement with the learned JC in that regard.

[26] In regards to the *Alcontara* notice issue, we would need to say a little more in the context of the evidence in this appeal before us. It is this. We noted that the appellant was not able to furnish useful information or particulars about the person in Hong Kong called John who had purportedly handed him the bag that contained the dangerous drugs. Indeed according to the appellant, Eva was dealing with John more than him. No address nor handphone number of John were given to the police in the course of investigation, including the

caution statement of the appellant. In such a situation, it would be unfair to expect the police to trace this person named John whom the appellant had claimed to have handed him the bag in Hong Kong. It can hardly be said that a proper *Alcontara* notice had been given by the appellant to the investigating authority. In the *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 case itself, the accused person had given the personal particulars of Che Mat, whom the accused had claimed was the owner of the *keropok* when he was stopped by the police. He had told the police that the cargo in the gunny sacks in his car boot was *keropok* as told to him by Che Mat. He proceeded to give the particulars of Che Mat, including his telephone number. The *keropok* later, on further examination, turned out to be dangerous drug, cannabis. The investigating officer, despite admittedly in possession of this particular information about Che Mat, also admittedly did not carry out any investigation to check out the veracity of Alcontara's assertion, backed by specific particulars regarding Che Mat, who could either be a real person or a mere creation of Alcontara's imagination. As was alluded to earlier, Alcontara was convicted on the charge of drug trafficking in the cannabis and was sentenced by the High Court to death by hanging by the learned trial judge who was of the considered view that Alcontara's defence was but an afterthought. His conviction and sentence were affirmed by the Court of Appeal. On appeal to the Federal Court, his conviction and sentence were set aside. It was found by the apex Court Justices that Alcontara should not be penalised by the lack of ingenuity on the part of the investigating officer. In essence, Alcontara had been highly prejudiced by the failure by the investigating officer to investigate into the veracity of Alcontara's version of events, which was given at the earliest opportunity, thereby eliminating any possibility of embellishment by Alcontara. Alcontara might have lied to the police, but the omission to investigate by the police had created a reasonable doubt on the prosecution case. He was denied the opportunity of having his defence fairly investigated by the police investigation. That prejudice had occasioned a grave miscarriage of justice against Alcontara. But, on the evidence as adduced before the learned JC, the same cannot be said of the present appellant's version regarding John. The law report is replete with decisions on the *Alcontara* notice and if an example is needed, then a case such as *Ghasem Gharezadehsharbiani Hassan v Public Prosecutor* [2014] 5 MLJ 433 would suffice to illustrate how such a defence may be effectively erected by an accused person.

[27] It was also raised by learned counsel for the appellant that the appellant was a mere simpleton who did the thing he did because he was convinced to do it by DW2, his cousin. The plan was for him to bring the bag to Kuching which would contain four pairs of jeans and two t-shirts for business purposes. From the evidence surrounding this allegation, the learned JC had found the submission by learned counsel on his contention that the appellant was a simpleton to be a far-fetched proposition in light of the not so simple journey

that the appellant would have to undergo just to bring four pairs of jeans and two t-shirts meant for business in Kuching whereby he had to come all the way from Indonesia to Hong Kong for what could be patently described as a simple transaction that ought not to require such service involving the appellant having to come all the way from Indonesia. On top of that he would be paid five million Indonesian Rupiah for his effort with air plane ticket all paid for. The learned JC was not able to accept the contention that the appellant was a mere simpleton. Suffice it is for us to say that we agreed with the learned JC's conclusion on the matter.

[28] A few other complaints in regard to the investigation were raised in the written submissions advanced by learned counsel on behalf of the appellant. Among them are the following:

(a) the data from the five handphones seized that were not tendered by the prosecution;

(b) the missing monies and personal belongings of the appellant;

(c) that the appellant's hands were not swabbed;

(d) that a fitting test was not conducted;

(e) that Eva was the actual trafficker and the appellant was an innocent carrier; and

(f) that the appellant and Eva did not carry or weigh the bag when it was empty and examined its contents on the floor.

[29] Suffice for us to observe here that an investigation is left entirely to the discretion of the investigating officer. Not all tools of investigation must be applied in the course of an investigation depending on the real need for such tool to be applied in order to establish a certain fact necessary to be established. It would not be wrong to say that it depends on the experience of the particular investigating officer. His ultimate vindication will take place in the court where the sufficiency or otherwise of his investigative work will be unravelled for all to see. As an illustration, we would allude to the apex court's decision in *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233 where it was adverted by the apex justices, no less, that in a case of drug transaction involving an agent provocateur, it would not be imperative that finger printing or nail clipping examination must be done on the accused person for obvious reasons. In other words, where available evidence was already overwhelming to connect the accused with the drugs seized, not all investigative tools at the disposal must necessarily be applied to establish such factual circumstance. It all would depend on the dictates of the situation at hand confronting the investigating officer.

A OUR FINDINGS

[30] As such, on the break in the chain of evidence issue, we were of the respectful view that the learned JC was correct when he concluded that there was no break in the chain of evidence.

B

[31] On the issue of whether the appellant was an innocent carrier, again we agreed with the learned JC that the appellant was a trafficker, not an innocent carrier.

C

[32] We also agreed with the learned JC that the appellant had correctly invoked the presumptions of possession and of trafficking of the said impugned drugs and that the appellant had failed to rebut the said presumptions on the balance of probabilities. He had also failed to raise a reasonable doubt as to his guilt.

D

CONCLUSION

[33] In the upshot, premised on the above, we had unanimously dismissed the appellant's appeal. We were of the view that the evidence before the learned JC was such that he was justified in concluding as he did that a case beyond reasonable doubt had been established by the prosecution against the appellant on the preferred charge of trafficking in dangerous drugs, to wit, 2,290g of methamphetamine. We therefore had affirmed both the conviction entered against the appellant and the death sentence by hanging imposed on the appellant by the learned JC in the High Court.

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[34] We had so ordered.

G *Order accordingly.*

Reported by Ashok Kumar

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